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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

KIMBERLY BENSON, KARIMDAD BALOCH and **NEERJA JAIN GURSAHANEY**, individually and on behalf of all others similarly situated,

vs.

JPMORGAN CHASE BANK, N.A., individually and as successor in interest of **WASHINGTON MUTUAL, INC.**

JOHN ALEXANDER LOWELL, individually and on behalf of all others similarly situated,

vs.

JPMORGAN CHASE BANK, N.A., individually and as successor in interest of **WASHINGTON MUTUAL, INC.**

Civil Action No. CV 09-5272 (EMC)
Civil Action No. CV 09-5560 (EMC)

PLAINTIFFS' JOINT OPPOSITION TO MOTION TO TRANSFER VENUE

Date: February 17, 2010
Time: 10:30 a.m.
Place: Courtroom C
Hon.: Magistrate Edward M. Chen

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SUMMARY OF ISSUES PRESENTED

(1) Has Defendant JPMorgan met its heavy burden of showing that the Northern District of California is an inconvenient forum?

(2) Has Defendant JPMorgan shown that the *Gruenberg* complaint and the *Benson* and *Lowell* complaints involve "identical" parties and "identical issues", even though the *Benson* and *Lowell* complaints are significantly broader then the now dismissed *Gruenberg* complaint?

(3) Should the motion to transfer venue be denied due to JPMorgan's efforts to forum shop?

I. INTRODUCTION AND SUMMARY

The Motion to Transfer the *Benson* and *Lowell* actions to a Dallas, Texas courtroom does not and cannot assert that Plaintiffs' choice of forum is improper. In bringing this motion, Defendant JPMorgan Chase Bank, N.A. ("JPMorgan") must carry a heavy burden in order to disturb Plaintiffs' choice of forum. JPMorgan has failed to meet that burden. Moreover, JPMorgan cannot show any inconvenience that may arise from defending itself in the Northern District of California. To the contrary, with the acts in question squarely occurring within this Northern District, and with key witnesses being located here, the Northern District of California is clearly the appropriate forum for the rights of the Plaintiffs and Class members to be adjudicated.

The ability to bring a case in the venue of one's choice is an important right that should not be ignored without good cause. Moreover, throughout both this Motion to Transfer and the concurrently filed Motion to Dismiss, JPMorgan ignores that the two complaints filed in this district have substantial factual allegations that demonstrate that JPMorgan had ***actual knowledge*** of the Millennium Ponzi scheme but nevertheless still participated in the fraud. These additional factual allegations are critical because JPMorgan is seeking to bury factual distinctions by relying on the dismissal of a factually different complaint in the action entitled *Litson-Gruenberg v. JP Morgan Chase & Co.*, Case No. 7:09-CV-056-0 ("*Gruenberg* Action").

This motion is nothing more than procedural gamesmanship aimed at diverting two legitimate and properly filed Northern District actions to a faraway court where a factually different complaint was dismissed with prejudice. The motion to transfer is not based on any legitimate interest in federal comity or on the requirements of 28 U.S.C. § 1404. Rather, by stating that the Complaints at bar are "substantively identical," –a claim that is contradicted by a comparison of these two California complaints to the *Gruenberg* complaint—it is apparent that JPMorgan is playing fast and loose in order to bring these cases before a Court where it obtained a favorable result in a different case. As we explain below, the California actions and the Texas action are not "substantively

identical" and the entire premise of the motion is false. (Defendants' Motion to Transfer ("Mot. Tr.") at 3). More to the point, this type gamesmanship does not qualify as "good cause" justifying this Court's disturbance of the Plaintiffs' right to select the appropriate forum.

In short, transfer of this action to the Northern District of Texas is unwarranted either under a general federal comity theory or pursuant to 28 U.S.C. § 1404. Plaintiffs in both cases are California residents who properly seek to have their claims adjudicated in a California court. That right trumps the tactical advantage JPMorgan seeks from having the case adjudicated in the forum of its choice.

II. FACTUAL BACKGROUND

This case arises out of the Millennium Ponzi scheme, based out of Napa, California, that lasted for over four years and cost innocent investors over $250 million in losses. This action alleges that WaMu, through its Napa branch offices, knowingly and actively participated in the Millennium Ponzi scheme, in which Plaintiffs and the Class were defrauded into investing millions of dollars in fake Certificates of Deposit ("CDs") that were purportedly issued by Millennium Bank and United Trust of Switzerland, S.A. The founders of the Millennium Ponzi scheme claimed that these fake CD's could achieve exceptionally high rate of returns because they were "the benefactor of Swiss banking . . . as well as the vast global investment network that United Trust of Switzerland S.A. has built over the last 75 years." *See* Exh. A (Benson Complaint), attached to the Declaration of Aron K. Liang ("Liang Decl."), ¶ 1.

The money from investors was never actually invested. Instead, most of that money was sent in the form of personal checks to the Global Services offices in Napa, California and then deposited in an account at the WaMu Napa branch offices. *See* Liang Decl., Exh. A, ¶ 50. The sole authorized signatures on that account were Jackie and Kristi Hoegel, who handled the banking side of the Millennium Ponzi scheme. *See* Liang Decl., Exh. B (SEC Complaint), ¶ 41[1]. Tamara Miller and Bianca Greeves, two senior WaMu

[1] The SEC complaint is attached as Exhibit D to the *Benson* complaint.

officers based in Napa, knew that no money was being invested but was instead being diverted for personal expenses or to off-shore accounts. *See* Liang Decl., Exh. A, ¶¶ 51, 97.

The key WaMU account used by the Millennium Defendants[2] was opened at a WaMu branch office in Las Vegas in the name of a Nevada LLC created on the same day and using a business address in Napa, California. *Id.* at ¶¶ 46-49. According to a confidential source close to William Wise, the mastermind of Millennium, the WaMu accounts were opened in Las Vegas after at least three other banks had refused to conduct further business with Millennium. *Id.* at ¶ 44.

Between 2004 and 2008, Tamara Miller and Bianca Greeves had extensive contact with the Hoegels and were instrumental to the success of the scheme. According to Kristi Hoegel, she would visit the WaMu Napa branch offices frequently and occupied an inordinate amount of their time. *Id.* at ¶ 52. The Hoegels and Global Services were one of their largest customers. *Id.* at ¶ 97. Maintaining the Millennium account was not only important to WaMu generally but more importantly, was important to the success of the WaMu Napa branch offices, Tamara Miller and Bianca Greeves. Investor checks typically listed "UT of S," "United Trust of Switzerland," or "United Trust of Switzerland S.A.," as the payee. *See* Liang Decl., Exh. B at ¶ 42. The memo lines of the checks often referenced "CD" and stated a tern and an interest rate, included the words Millennium Bank, the name of a Millennium Bank CD salesman, and/or the term "investment" *Id.*

In addition, Tamara Miller personally oversaw the many wire transfers executed by Kristi Hoegel when she was in the bank, requiring hours of her time. *See* Liang Decl., Exh. A, ¶¶ 52, 97. Tamara Miller personally knew that all of the transactions involved a single WaMu bank account. She knew that the monies coming in were purportedly being invested in CDs and also knew that the money going out was being transferred off-shore

[2] The "Millennium Defendants" refer to William Wise, Jacqueline Hoegel, Kristi Hoegel, Millennium Bank, United Trust of Switzerland, S.A., UT of S, LLC, United T of S, LLC and Sterling I.S., LLC. The WaMu account that was used to perpetuate the fraud was for one of the Nevada LLCs, UT of S, LLC ("UT of S").

or for personal expenses. *Id.* From 2004 to 2008, Tamara Miller knew that all investor funds were commingled in a single account at WaMu, which was not used for investment purposes but were instead disbursed to, among others, William Wise, Jackie and Kristi Hoegel, the relatives of William Wise and the Hoegels and entities controlled by William Wise and the Hoegels. *See* Liang Decl., Exh. B, ¶ 47.

Specifically, Tamara Miller knew that the following large amounts of money were being wired out to the following entities and individuals:

(1) William Wise: $12.3 million

(2) Kristi Hoegel: $965,000

(3) Jackie Hoegel (Kristi Hoegel's mother): $854,000

(4) Brijesh Chopra: $90,000

(5) Philippe Angeloni: $20,000

(6) Lynn Wise (William Wise's wife): $1.68 million

(7) Daryl Hoegel (Jackie Hoegel's husband): $130,000

(8) Ryan Hoegel (Kristi Hoegel's brother): $34,000

(9) Laurie Walton (William Wise's secretary): $323,000

(10) United T of S, LLC: $225,000

(11) Sterling I.S., LLC: $504,000

(12) Matrix Administration, LLC: $476,000

(13) Jasmine Administration, LLC: $18,000

(14) Millennium Financial Group: $20,000

(15) United Trust of Switzerland, S.A.: $2.6 million

(16) UT of S, LLC (operating expenses): $1.1 million.

Id. at ¶ 48.

The sheer volume of bank transactions required by the Hoegels made their transactions memorable. It was because the Hoegels occupied so much bank time that Bianca Greeves recommended the installation of a remote banking platform at the Global Services offices. *Id.* at ¶ 67. It is uncontroverted evidence that WaMu, by Jennifer

Blevins, Senior Specialist in the Business Treasury Services Department gained actual knowledge of the fraud based on two audits she conducted. In February of 2008, after conducting a thorough audit of the Global Services operations, WaMu provided the Hoegels with a "cash management transfer" software ("CMT") system that permitted the Hoegels to effect outgoing wire transfers globally from the Napa office. *Id.* at ¶ 67. In September of 2008, just nine months later, Blevins was responsible for a second WaMu audit of the Global Services operation prior to providing a "remote deposit capture" ("RDC") system, a scanning machine and banking interface, which would permit the Hoegels to deposit investors' checks directly from their Napa office without any WaMu oversight or supervision. *Id.* at ¶ 73.

Providing these systems to an operation the size of Global Services is unprecedented. *Id.* at ¶ 68. Specifically, because these programs allow a business to act like a "bank within a bank", audits relating to the provision of these services are taken seriously and conducted thoroughly. *Id.* at ¶ 5. WaMu, through Blevins, gained actual knowledge of the true nature of the fraud through these two audits but nevertheless continued to willingly participate in the fraud. *Id.* at ¶ 70.

WaMu bank records, that were available to Tamara Miller and Bianca Greeves, establish that: (1) no investor funds were used for legitimate banking or investment activities; (2) investor funds were commingled in the account; (3) money movement in the WaMu account included transfers to and from each of the Millennium Defendants, linking all of them to the scheme; (4) millions of dollars of new investor monies were used to make apparent Ponzi payments to earlier investors; (5) each of the individual Millennium Defendants diverted investor funds for their personal use (totaling approximately $14 million); (6) friends and relatives of the Millennium Defendants received from tens of thousands to millions of dollars of investor funds for no consideration; and (7) investor funds were also used to pay personal expenses, including at least $2.8 million in credit card expenses, $820,000 in auto expenses, $870,000 in aviation expenses, and $90,000 in wine expenses (totaling approximately $4.6 million). *See* Liang Decl., Exh. B, ¶ 49.

Tamara Miller and Bianca Greeves knew all of these facts due to their close interaction with the Millennium Ponzi scheme over a four year period.

III. PROCEDURAL BACKGROUND

Despite the fact that there was no connection between the Millennium Ponzi scheme and the Northern District of Texas, on March 26, 2009, the SEC filed an action against Millennium Bank, William J. Wise, Jacqueline Hoegel, Kristi Hoegel, United Trust of Switzerland, S.A., UT of S, LLC, and various other individuals and entities related to the Millennium Ponzi scheme entitled *Securities and Exchange Commission v. Millennium Bank, et. al.*, Case No. 7:09-CV-00050-0 (the "Receivership Action"), pending before District Judge Reed O'Connor. *See* Defendants' Request for Judicial Notice ("Def. RJN"), Exhs. 1 and 2.

The Hoegels are California residents. William Wise is a Canadian citizen who resided in North Carolina. JPMorgan's primary connection to the Millennium Ponzi scheme is through its Napa, California branch offices. On March 25, 2009, Judge O'Connor named Richard B. Roper as the receiver ("Receiver") and enjoined all complaints against the defendants named in the Receivership Action. As JPMorgan was not named as a defendant in the Receivership Action, that order had ***no impact*** on any lawsuits against JPMorgan. *See* Def. RJN at Exhs. 3 and 4.

The Receiver has obtained documents, cell phones and computers from the defendants in the Receivership Action and has served subpoenas on JPMorgan and other entities.[1] *See* Def. RJN at Exh 6; Mot. Tr. at 1. Plaintiffs have chosen to bring their claim in the Northern District of California. The Electronically Stored Information (ESI), apparently consisting of 5.46 terabytes of data seized by the Receiver will have to be provided to counsel for the Plaintiffs in electronic format, regardless of venue. As all of this information will be provided either on discs, hard drives, or otherwise transmitted electronically, the current location of information is irrelevant to whether the case should be moved away from where Plaintiffs filed the actions. Indeed, as the Receiver has conceded publicly many times, despite its efforts "the total value of the Estate is likely to

be a mere fraction of the millions of dollars that would be to pay all anticipated claims against the Estate." RJN Exh.6, Dec. 4, 2009 Receiver Statement. Accordingly, the motion fails to make any factual showing how the pendency of the Receivership is grounds to move these cases. The motion also fails to show how it would be more convenient to provide ESI to counsel for Plaintiffs if the claim is brought in the Northern District of California or the Northern District of Texas.

In addition, the motion is silent as to why it makes sense to move a case when the key witnesses are located in this District. The key JPMorgan witnesses, including Ms. Miller and Ms. Greeves are in California, as are the Hoegels. It would be easier to depose them in California using documents and resources located nearby in California. Further, the witnesses remain in subpoena power for both deposition and trial. On the other hand, there are no relevant witnesses in the Northern District of Texas; only the Receiver is located there. Any efforts to obtain evidence from the witnesses will be complicated by moving the matter away to the Northern District of Texas, a forum that presently has no connection to the dispute other than the SEC filing its receivership action in that forum.

On April 15, 2009, the *Gruenberg* complaint was filed in the Northern District of Texas against JP Morgan Chase & Co. The *Gruenberg* complaint was far more limited in its factual allegations. The only facts alleged to support her claim that JPMorgan had actual knowledge of the Millennium Ponzi scheme were: (1) JPMorgan's failure to perform due diligence; and (2) JPMorgan's violation of the Bank Secrecy Act and the Anti-Money Laundering compliance program. *See* Defs. RJN, Exh. 9 (*Gruenberg* Complaint), ¶¶ 29-40, 67-71. These allegations are thin in comparison to the allegations presented by the Plaintiffs here.

On November 5, 2009 and November 23, 2009, respectively, the *Benson* and *Lowell* complaints were filed in the Northern District of California against JPMorgan Chase Bank, N.A. The factual allegations against JPMorgan in the two complaints are significantly different. The key factual differences are the allegations that (1) JPMorgan learned of the fraud due to the deep personal involvement of Tamara Miller and Bianca

Greeves with the alleged wrongful transactions related to the Millennium Ponzi scheme and; (2) the fact that JPMorgan conducted two audits of the Global Services operation before providing the company with access to specialized computer software and hardware that transformed Global Services into a "bank within a bank." In conducting these audits, JPMorgan gained actual knowledge of the fraud. *See* Liang Decl., Exh. A, ¶¶ 67-74; Exh. C (*Lowell* complaint), ¶¶ 33-36; 45-51.

These facts must be construed in conjunction with the other facts alleged in the *Benson* complaint and the *Lowell* complaint that were known to JPMorgan over the last four years:

(1) William Wise, Jacqueline Hoegel, Kristi Hoegel, Millennium Bank, United Trust of Switzerland, S.A., UT of S, LLC, Millennium Financial Group, UT of S, United T of S, LLC and Sterling I.S., LLC (the "Millennium Defendants") had no legitimate business purpose and were not licensed or registered to sell or promote securities;

(2) The Millennium Defendants had represented they were involved in the securities business and were selling investments to Plaintiffs and other Class members;

(3) The Hoegels were depositing large sums of monies via suspicious bulk check deposits. These checks were specifically designated by the Plaintiffs and Class members as being for the purpose of purchasing CDs from the Millennium Defendants;

(4) These deposits from the Plaintiffs and other Class members were not segregated but were being commingled in WAMU accounts used by the Millennium Defendants;

(5) WAMU executed large wire transfers on behalf of the Millennium Defendants to various offshore accounts in names other then those of the Millennium Defendants to offshore banking havens, such as Switzerland and Trinidad and Tobago;

(6) WAMU's Napa branches expended considerable time and resources managing the Millenium Defendants' WAMU accounts, which were amongst the largest accounts handled at the Napa branches. At least one branch manager and commercial

banking officer were dedicated to monitoring and assisting in the banking transactions executed by Wise and the Hoegels over a four year period;

(7) Funds retained in the Millennium Defendants' WAMU accounts were being misappropriated by Wise and the Hoegels for personal use.

See Liang Decl., Exh. A, ¶ 97.

On December 16, 2009, Judge O'Connor dismissed the *Gruenberg* action, meaning there are currently no actions on behalf of individual investors currently in any District Court other then the Northern District of California. *See* Def. RJN, Exh. 10. In fact, at the time JPMorgan filed its Motion to Transfer, the only case currently pending before the Northern District of Texas is the Receivership Action. The Receivership Action and the *Benson* and *Lowell* Actions are distinct cases against different defendants. Thus, transferring the California cases to the Northern District of Texas would serve no goal of judicial efficiency. The fact that the Receiver was monitoring the *Gruenberg* action and has issued statements about the *Gruenberg* action are meaningless as to the question of venue. *See* Def. RJN, Exhs. 11 and 12.

IV. ARGUMENT

A. Legal Standard

JPMorgan does not assert that Plaintiffs' choice of forum is improper but instead, the motion requests that the Court exercise its discretion to transfer the case to the Northern District of Texas solely for tactical purposes. The motion is without good cause and the Court should deny the motion.

In order to prevail on its Motion, Defendant must "make a ***strong showing of inconvenience*** to warrant upsetting the plaintiff's choice of forum." *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986) (emphasis added); *United Mort. Corp. v. Plaza Mort. Corp.*, 853 F. Supp. 311, 315 (D. Minn. 1994) (holding that the party seeking transfer "bears the heavy burden of showing that the balance of factors ***strongly*** favors the movant"); *citing Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). Defendant's sole arguments for requesting that this Court perform the extraordinary act of

transferring this case to the Northern District of Texas are twofold: (1) the presence of the Receivership in the Northern District of Texas and (2) the previous presence of the *Gruenberg* action that has been dismissed. Neither argument meets the necessary burden, nor are they equitable.

B. Federal Comity Does Not Warrant Transfer of the California Actions to the Northern District of Texas

JPMorgan misstates and mischaracterizes the federal comity principle. The federal comity principle applies only where the first-filed complaint and the subsequently filed complaint are identical and involve ***identical parties and issues***. *Alltrade, Inc. v. Uniweld Products, Inc.*, 946 F.2d 622, 625 (9th Cir. 1991); *Pacesetter Systems, Inc. v. Medtronic, Inc.* 678 F.2d 93, 95-96 (9th Cir. 1982). "The first to file rule however, is not one of absolutes." *Koch Engineering Co. v. Monsanto Co.*, 621 F. Supp. 1204, 1207 (E.D. Mo. 1985). "[T]his 'first to file' rule is not a rigid or inflexible rule to be mechanically applied, but rather is to be applied with a view to the dictates of sound judicial administration." *Pacesetter*, 678 F.2d at 95. Courts "can, in the exercise of their discretion, dispense with the first-filed principle for reasons of equity." *Alltrade*, 946 F.2d at 628. When suits are filed by different litigants, each presumptively entitled to its choice of forum, mechanical application of the "first-filed" doctrine is improper. *Central States, Southeast and Southwest Areas Pension Fund v. Paramount Liquor Co.*, 203 F.3d 442, 444-445 (7th Cir. 2000).[2]

In applying the first-to-file rule, a court looks to three threshold factors set forth in *Alltrade*: (1) the chronology of the two actions; (2) the similarity of the parties, and (3) the similarity of the issues. *Sony Computer Entertainment America Inc. v. American Medical Response, Inc.*, 2007 U.S. Dist. LEXIS 24294 at *5-6 (N.D.Cal. Mar. 13, 2007); *see also Z-Line Designs, Inc. v. Bell'O Int'l LLC*, 218 F.R.D. 663, 665 (N.D. Cal. 2003); *Best W. Int'l, Inc. v. Patel*, 2008 U.S. Dist. LEXIS 19797 at *10 (D. Ariz. Mar. 3, 2008). The "first-filed" doctrine should be applied narrowly to "truly duplicative" proceedings. *Kedia v. Jamal,* 2007 U.S. Dist. LEXIS 30343 at *8 (3d Cir. April 25, 2007). While the

Gruenberg action and the SEC's Receivership Action --which seeks an entirely different type of recovery against other defendants--were filed prior to the *Benson* action, the other two factors: (1) identical parties and (2) identical issues are not present here. As such, denial of this motion is warranted.

1. Parties are Not Identical

The parties in the now dismissed *Gruenberg* Action, the *Benson* and *Lowell* Actions and the Receivership Action are ***different***. They are not "substantively identical." (Mot. Tr. at 3). First, neither the Plaintiffs and the Defendants are the same. Second, while the definitions of the Class are similar, they are not identical. In the *Gruenberg* complaint, the Class is defined as "all those who invested in the Ponzi scheme which is the subject of *Securities and Exchange Commission v. Millennium Bank et al*, case number 7:09-CV-00050-O, currently pending before this Court . . .", explicitly defining the Class so that her case would be identical in scope of the Receivership Action. Both the *Benson* and *Lowell* complaints define the proposed Class more specifically, focusing on those persons or entities in the United States who during a select time period purchased specific securities from certain Millennium Defendants. In both the *Benson* Complaint and the *Lowell* Complaint, the class definition is defined as follows:

> **"All persons or entities in the United States who, between July 1, 2004 to the present, purchased or otherwise acquired a purported Certificate of Deposit ("CD") from or through Millennium, UTS and/or one of the Nevada LLCs."**

This Class definition focuses on certain investors in the Millennium Ponzi scheme and was designed so as not to be exactly coextensive with the Receivership Action.

Secondly, the Defendant is not the same. The *Gruenberg* action is against JPMorgan Chase & Co. while the *Benson* and *Lowell* actions are proceeding against JPMorgan Chase Bank, N.A. Moreover, the *Gruenberg* Action has been dismissed and thus there is no currently pending action against either JPMorgan Chase & Co. or JPMorgan Chase Bank, N.A. and thus no danger of inconsistent rulings or judgments and no danger of overlapping activities. Plaintiffs here have pled a viable complaint, as

demonstrated in their Opposition to Defendant JPMorgan's Motion to Dismiss, that is vastly different from the *Gruenberg* complaint. Plaintiffs should not be transferred due to an action that is no longer even pending. No judicial economy will be gained from such a transfer.

Next, JPMorgan tries to argue that "potential" claims against the Millennium Defendants means that the Receivership Action and the *Benson* and *Lowell* actions have the same defendants. This argument is just plain wrong. The California Plaintiffs have brought ***no claims*** against the Millennium Defendants. The case law relating to the "first-filed" doctrine states that it should be interpreted narrowly and only when the parties are the same. *See Kedia*, 2007 U.S. Dist. LEXIS 30343 at *8. JPMorgan cites no case law for the proposition that the "possibility" of same parties justifies application of the "first-filed" doctrine. Moreover, it is clear that the Receivership Action and the California Actions seek two different forms of relief, one seeks recovery from the Millennium Defendants while the cases here seek recovery from JPMorgan, as a co-conspirator in the Millennium Ponzi scheme. If the mere possibility that the Millennium Defendants might be sued grants jurisdiction to the Northern District of Texas, then the Northern District of Texas' specific order enjoining ***only claims*** against the Millennium Defendants would be rendered meaningless and any cause of action even tangentially related to the Millennium Defendants would be subject to stay and transfer.

2. Issues are Not Identical

The issues in the *Benson* and *Lowell* actions are not identical to those in the now dismissed *Gruenberg* action or the Receivership Action and there is no danger of inconsistent judgments. The *Gruenberg* action is far more limited then the California actions, basing their entire complaint around the lack of due diligence conducted by JPMorgan. Critically, the *Gruenberg* action fails to allege how JPMorgan gained actual knowledge of the Millennium Ponzi scheme because of the direct personal interactions between Tamara Miller, Bianca Greeves (two senior WaMu officers) and the Hoegels over a four year time period and through two audits conducted by JPMorgan prior to

providing the Millennium Defendants with a remote banking platform. These facts are alleged in the *Benson* complaint. In his order granting the motion to dismiss in the *Gruenberg* action, Judge O'Connor wrote, "the allegations are an artful manner of stating that the Defendant should have known the Ponzi defendants' action. Plaintiff's factual narrative is, at best, merely a story of suspicious activity that Plaintiff contends should have provided Defendant notice of the ponzi scheme." *See* Def. RJN, Exh. 10, pg. 5. The *Benson* and *Lowell* complaints, however, specifies the specific individuals who participated in the Millennium Ponzi scheme, how they gained actual knowledge of the scheme and how they assisted in the fraud. This difference is critical since a blind invocation of the federal comity principle would allow JPMorgan to avoid having to accept responsibility for its involvement in the Millennium Ponzi scheme because the less detailed complaint, by accident of circumstance, was the first adjudicated.

The level of activity of Judge O'Connor's adjudication of the *Gruenberg* action is not meaningful since he was not presented for example, with the more detailed allegations of the *Benson* complaint, in particular those related to the two audits conducted by JPMorgan. While Judge O'Connor may have more experience with the Receivership, this does not justify transfer of this case, especially when the parties and the issues in the California actions are different from both the *Gruenberg* action and the Receivership Action. *Persepolis Enterprise v. UPS, Inc.*, 2007 U.S. Dist. LEXIS 68699 (N.D. Cal. Sept. 7, 2007) is distinguishable in that the two complaints at issue in *Persepolis* had identical parties and issues. Here, the allegations in the *Gruenberg* complaint are meaningfully different from the allegations in the *Benson* complaint.

In addition, the *Gruenberg* complaint does not bring causes of action for conspiracy, for aiding and abetting conversion and for violation of the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, *et. seq.* These three causes of action have distinctly different elements then the claims for aiding and abetting. Regardless, these three claims are different from the *Gruenberg* Action and **not addressed** by Judge O'Connor on his order dismissing the *Gruenberg* Action. Thus,

transfer to the Northern District of Texas would bypass the right of the aggrieved investors to have those claims adjudicated, instead of deemed "dismissed" pursuant to a technicality.

Similarly, the California complaints are not identical to the Receivership Action because they allege that JPMorgan is liable to investors in the Millennium Ponzi scheme because of independent actions undertaken by JPMorgan separate and distinct from the actions undertaken by the Millennium Defendants. The Receivership Action has no claims against JPMorgan and thus there is no danger of inconsistent judgments. Moreover, the Receivership Action is not principally responsible for determining liability but is instead focused on preserving and retrieving assets that belong to the Millennium Defendants. The Receivership Action has no interest in whether or not JPMorgan is liable to the investors in the Millennium Ponzi scheme. As such, there is no danger of any inconsistent rulings or decisions between the Receivership Action and the *Benson* and *Lowell* actions. JPMorgan's liability is independent of the preservation of the assets of the Millennium Defendants and neither will impact the other.

3. JPMorgan's Forum Shopping Does Not Support Transfer

In addition, there are three exceptions to the first-to-file rule: 'bad faith, anticipatory suit, and forum shopping.' *Best W.*, 2008 U.S. Dist. LEXIS 19797 at * 16. Even assuming that the three *Alltrade* factors were present (which Plaintiffs do not concede), courts have chosen not to transfer cases to the venue of the first-filed action if there are issues relating to forum shopping or bad faith. *Alchemist Jet Air, LLC v. Century Jets Aviation, LLC*, 2009 U.S. Dist. LEXIS 49472 at * 13 (N.D. Ill. June 12, 2009); *see also Schwarz v. National Van Lines, Inc.*, 317 F. Supp. 2d 829, 832-33 (N.D. Ill. 2004). Here, JPMorgan's intent is clear, stating that transfer will deprive these aggrieved investors of no rights since they could seek "relief under Fed. R. Civ. P. 59; and the plaintiff may appeal." (Mot. Tr. at 4). It is evident that this Motion to Transfer is premised on tactical gamesmanship in an effort to place these cases before a court that dismissed a previous less well pleaded complaint, not legitimate considerations. In other

words, even though JPMorgan ***knows*** that the *Benson* and *Lowell* complaints are different and contain allegations showing JPMorgan's actual knowledge, they want to deprive the Plaintiffs here of their day in court, giving them victory at the motion to dismiss stage by technicality and not substance. This gamesmanship is not what the principles of federal comity was meant to protect.

4. MDL Petition

JPMorgan's citation to the MDL Petition does not support transfer to the Northern District of Texas. The petition itself articulates that the appropriate district for this case is the Northern District of California, not the Northern District of Texas. For example, the *Benson* Action is broader and more detailed then the *Gruenberg* complaint, including specific evidence showing the knowledge possessed by Tamara Miller and Bianca Greeves about the Millennium Ponzi scheme based on their extensive personal involvement with the Millennium bank account, as well as knowledge gained from two audits undertaken by JPMorgan prior to providing Global Services with unprecedented access to sophisticated banking software and hardware. *See* Liang Decl., Exh. A, ¶¶ 52, 67-74, 97. In addition, the Northern District of California is the nexus of this case since it was JPMorgan's Napa branch offices that were involved in the Millennium Ponzi scheme. *See* Def. RJN, Exh 13 (MDL Brief) at pp. 1-2. Moreover, the MDL process only consolidates cases for *pre-trial* purposes. All cases transferred pursuant to an MDL Petition are required to be sent back to the original district court for trial. *See* Judicial Panel on Multidistrict Litigation ("JPML") Rule 7.6(b); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 32-33 (1998). This is a far cry from what JPMorgan seeks here and its request should be rejected.

C. Public and Private Factors Favor Plaintiffs and Support Denial of JPMorgan's Motion to Dismiss

JPMorgan, as the moving party, bears a heavy burden to prevail on a motion to transfer under 28 U.S.C. § 1404. In order to prevail on their Motion, Defendants must "make a ***strong showing of inconvenience*** to warrant upsetting the plaintiff's choice of

forum." *Decker Coal Co.*, 805 F.2d at 843. "Change of venue, although within the discretion of the district court, should not be freely granted. Courts are in the business of deciding cases, not playing procedural hockey among available districts at the whim of dissatisfied parties." *In re Nine Mile Ltd.*, 692 F.2d 56, 61 (8th Cir. 1982). There is a strong presumption in favor of the plaintiff's choice of forum. *Christensen Hatch Farms, Inc. v. Peavey Co.*, 505 F. Supp. 903, 911 (D. Minn. 1981). "[U]nless the balance is strongly in favor of the defendant, the ***plaintiff's choice of forum*** should rarely be disturbed. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

JPMorgan has not met that burden. In deciding on a motion to transfer venue, the Court must show: (1) the existence of an adequate alternative forum; and (2) that the balance of private and public interest factors ***weigh strongly*** in favor of transfer. *Loya v. Starwood Hotels & Resorts Worldwide, Inc.*, 583 F.3d 656, 664 (9th Cir. 2009). Private interest factors include "(1) relative ease of access to sources of proof; (2) the availability of compulsory process for attendance of hostile witnesses, and cost of obtaining attendance of willing witnesses; (3) possibility of viewing subject premises; (4) all other factors that render trial of the case expeditious and inexpensive." *Id.* Public interest factors include "(1) administrative difficulties flowing from court congestion; (2) imposition of jury duty on the people of a community that has no relation to the litigation; (3) local interest in having localized controversies decided at home; (4) the interest in having a diversity case tried in a forum familiar with the law that governs the action; (5) the avoidance of unnecessary problems in conflicts of law." *Id./*

1. Private Interest Factors Favor Litigation in California

All of the private interest factors support denial of JPMorgan's motion to transfer. To the extent that certain documents may be in the Northern District of Texas, JPMorgan has not shown how producing ESI maintained in Texas will cause significant expense or inconvenience. All or most evidence in this case will likely be produced in electronic form. *See Van Slyke v. Capital One Bank*, 503 F. Supp. 2d 1362-63 (N.D. Cal. 2007) ("With technological advances in document storage and retrieval, transporting documents

does not generally create a burden. . . . This factor . . . is of diminished importance and is neutral toward transfer."). *See also Charter Oak Fire Ins. Co. v. Broan-Nutone, LLC*, 294 F. Supp. 2d 218, 221-22 (D. Conn. 2003) (noting that "modern photocopying technology and electronic storage deprive this issue of practical or legal weight"); *Central States, S.E. & S.W. Areas Pension Fund v. Salasnek Fisheries, Inc.*, 977 F. Supp. 888, 892 (N.D. Ill.1997) (noting that defendant had not "demonstrated that [it] cannot bring the critical documents to this district").

In this case, more meaningful is the fact that the Hoegels and the key JPMorgan witnesses are in Napa, California. Almost all of the individuals with any knowledge regarding the extent of JPMorgan's involvement in the Millennium Ponzi scheme are located in the Northern District of California. As such, the first two private interest factors: (1) relative ease of access to evidence; and (2) availability of compulsory process for attendance of hostile witnesses, and cost of obtaining attendance of willing witnesses favor the Northern District of California. No one with any knowledge regarding JPMorgan's involvement in the Millennium Ponzi scheme resides in the Northern District of Texas. If a trial is held in the Northern District of Texas, everyone of interest will be required to be brought to Wichita Falls, Texas.[3]

Moreover, the only physical locations that may be relevant to this case, the two JPMorgan Napa branch offices and the Global Services office are all located in Napa, California. While JPMorgan argues that the Northern District of Texas is a convenient location, this is inaccurate. The Northern District of Texas courthouse where the Receivership Action and the *Gruenberg* action is in Wichita Falls, which is an hour flight from Dallas. Regardless, none of the defendants or plaintiffs identified by JPMorgan reside in Wichita Falls, or even in Dallas. Only the Receiver and the accounting firm hired by the Receiver to review the Millennium Ponzi scheme are in the Northern District

[3] Even though Judge Reed O'Connor has a courtroom in Dallas, Texas, pursuant to Special Order No. 3-259 of the Northern District of Texas, all case filed in the Wichita Falls Division are assigned to Judge O'Connor. Those cases are to be resolved in Wichita Falls.

of Texas. Convenience of the Receiver is not a private interest factor recognized by the law. The third private interest factor, therefore, also favors the Northern District of California.

While the Northern District of Texas may have jurisdiction over certain of the Millennium Defendants, the Northern District of California would have similar subpoena authority. Regardless, that factor does not strongly favor that district since the key JPMorgan employees (who are not under the jurisdiction of the Northern District of Texas) are in California. JPMorgan's eagerness to have its California witnesses made available only in Texas is not an important factor and telling of the tactical advantage that JPMorgan perceives in the Northern District of Texas. JPMorgan's status as a corporate defendant weighs against it. *See Miracle v. N.Y.P. Holdings, Inc.*, 87 F. Supp. 2d 1060, 1073-74 (D. Haw. 2000) (denying motion to transfer under § 1404 because defendants "failed to demonstrate that it would be prohibitively expensive or difficult" for them to travel to litigate the action, and noting that a large corporation can more easily travel for litigation than can private individuals); *Dwyer v. General Motors Corp.*, 853 F. Supp. 690, 693 (S.D.N.Y. 1994) (noting that the court may consider the relative means of the parties in deciding a transfer motion).

Moreover, the courts have recognized that both parties will always bring partisan witnesses to trial so this court should give little weight to the venue most convenient for partisan witnesses. The more important issue is the district where 1 it will be the easiest to obtain testimony from relevant third party witnesses. "Both sides can be expected to prevail upon their partisan witnesses to appear at trial if their testimony will be favorable. If it is unfavorable, then the only avenue for live trial testimony is the subpoena." *Van Slyke*, 503 F. Supp. 2d at 1353, 1364. There is no evidence that any of the third party witnesses (who may need to be compelled to trial) are located in the Northern District of Texas. On the other hand, at least one of Defendants' service providers, Google, is headquartered in the Northern District of California. *See* Def. RJN, Exh. 7, p. 1, Def. Mem. at 7-8. As such, this factor favors the Northern District of California.

2. Public Interest Factors Favor Litigation in this District

The public interest factors also favor denial of the motion to transfer. While the Northern District of Texas may have a slightly smaller caseload then the Northern District of California, this is of little significance. On the other hand, there is strong evidence, set forth in the factual background above, showing that the center of gravity of this litigation is the Northern District of California. As such, at least two of the public interest factors: (1) imposition of jury duty on people with a relationship to the litigation; and (2) local interest in having localized controversies decided at home favor the Northern District of California. Moreover, as the Northern District of Texas recognized, because the wrongdoing occurred in California, California law should apply. *See* Def. RJN, Exh. 10, pg. 2. One of the public interest factors is the interest in having a diversity case tried in a forum familiar with the law that governs the action. Here, as California law governs, this public interest factor clearly weighs in favor of the Northern District of California.

3. Plaintiffs are Residents of California

Plaintiffs' venue choice should be given extra weight because most of the Plaintiffs are residents of the forum district. *Int'l Painters v. Tri-State Interiors, Inc.*, 357 F. Supp. 2d 54, 56 (D. D.C. 2004) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981)). *See also Varsic v. United States District Court*, 607 F.2d 245, 252 (9th Cir. 1979) (granting plaintiff's petition for a writ of mandamus, and reasoning that "if Varsic is required to prosecute this action in New York, some three thousand miles from his home, he will suffer the very prejudice which the liberal venue provision of 29 U.S.C. § 1132(e)(2) was designed to avoid"). JPMorgan does not dispute that two of the three Plaintiffs in the *Benson* Action and the sole Plaintiff in the *Lowell* Action are from California but it argues that this is irrelevant because this is a putative class action.

In *Van Slyke*, the defendants made the same argument, and the Court nevertheless deferred to the plaintiffs' choice of forum because (1) no class had yet been certified, so the named plaintiffs were the only plaintiffs, and (2) even if a nationwide class were certified, the named plaintiffs would bear a fiduciary responsibility to lead the class, and

other class members would never have to appear in the action. In his opinion, Judge Alsup held that, even in a putative class action, Plaintiffs' choice of forum is still entitled to deference. *Id.* Plaintiffs here bear a similar responsibility to absent members of the putative class, and they are the only individual Plaintiffs at this time.

Defendants' citation to *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987) is of no assistance. In fact, that Ninth Circuit acknowledged that, even in a putative class action, Plaintiffs' choice of forum is still entitled to deference. *Id.* The court's decision in *Lou* focused on the contacts between the parties and the different venues. "In judging the weight to be accorded Lou's choice of forum, consideration must be given to the extent of both Lou's and the Belzbergs' contacts with the forum, including those relating to Lou's cause of action." *Id.* The key in selecting the appropriate forum is whether the operative facts occurred in the forum and if the forum has an interest in the parties or the subject matter. *Id.* In this case, as discussed in detail above, the nexus of the case is in Napa, which is in the Northern District of California. JPMorgan's participation in the Millennium Ponzi scheme all went through their Napa branch offices.

4. JPMorgan Fails to Meet Its Heavy Burden of Showing the Private and Public Interest Factors Favor Transfer

The burden on the defendants to prevail on this motion is high. *Decker Coal Co.*, 805 F.2d at 843. While JPMorgan may have offered one or two reasons for why the Northern District of Texas is advantageous as compared to the Northern District of California, there are more reasons favoring the Northern District of California. Regardless, JPMorgan has a high burden to overcome and it has failed to do so. As such, denial of its motion to dismiss is warranted.

/ / /

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion to Transfer Venue.

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Respectfully submitted,

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